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### Assessment of Certain Justice towards Tax Omnibus Law in Indonesia

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#### **Abstract**

The assessment of justice and legal certainty of the tax omnibus law that has been decided by the Government to be compiled in one law that aims to increase investment, guarantee business continuity, and create business climate justice. The tax text in the tax omnibus law which is emphasised on increasing investment and equitable regulation draw concern from various groups in community. This means that the tax text is so flexible embodied in a form of tax omnibus law. This goal is in line with the meaning of the self-assessment system that has been in effect since 1983 which requires taxpayers to fulfill their own tax obligations. The affirmation of the system in the law is a legal step aimed at three philosophical meanings, which are legal justice, social justice and moral justice. However, the legal meaning is often faced with a separate meaning of one another so that it becomes a confusion of thinking according to the law.

**Keywords:** *Omnibus Law; Justice and Law Certainty; Tax*

#### **Introduction**

Tax bill is a developing text which is not stagnant or impermanent. The tax bill can always be read and understood differently and is also not authoritative. The tax text must be interpreted continuously in different contexts because the tax text is flexible and agile. This is how to read and discuss tax texts in terms of fairness and certainty as non-singular discussions like the omnibus law discussion in tax texts (tax omnibus law).

The state Law defines tax as:

Mandatory contributions to the state owed by individuals or bodies that force in accordance to the Law, by not obtaining a direct reward and being used for state purposes for the greatest prosperity of the people. (Republik Indonesia, 2007)

The text is not limited on the elements of meaning mention in the definition. If the text is only read by its written meaning, the text will be stagnant, rigid or in other words, not dynamic. It is extremely difficult if the text is interpreted on the element of “forcing” and “juridical” element with the logic set in the law because the text will be more difficult to move. Meanwhile, the assessment of justice and law certainty certainly make text have another meaning, as stated by Montesquieu:

Tax collection is a certain portion of the property owned by every citizen that is set aside to secure or to be able to enjoy properly the remaining property. To properly determine tax collection, consideration must be given to the needs of the state and the needs of citizens. (Montesquieu, 1977, p. 219)

The text stated by Montesquieu does not emphasize the 'forcing' element as stated in the Law,<sup>1</sup> because the "force" element makes a rigid and non-dynamic text. Debate on the element of "force" is a lengthy debate with the argument that the without the word "force", the text already contains "forcing" nature as long as the norms are regulated by State Law. Because the norms of the State Law have coercion meaning and imply sanctions if they are not obeyed. Similar to the phrase "consideration must be given to the needs of the state" stated by Montesquieu (1977, p. 219), is a meaning of a text that is difficult to for the state to do careful consideration in compiling norms that would mean justice and certainty without putting any emphasis on the element of forcing.

This is in line with the tax text in the tax omnibus law which concerned with increasing investment and fair regulation and become the concern of various groups. This means that the tax text is very flexible embodied in the tax omnibus law. Since tax text does not stand alone (only focused on domestic economy) but is influenced by the global economic situation that continues to experience dynamic changes due to international world trade policy in which must be anticipated by its uncertainty.

The concept of tax omnibus law tax with the steps or policies implemented is part of the discussion that is not rigid. The concept of policy is the concept of a tax text that can be changed according to needs without forgetting the essence of justice and certainty when the law has been agreed and implemented. This paper will explain the need to deconstruct the norms of the tax omnibus law and change the literary text or the reality of the old tax meaning with new meaning. The process of meaning making of the tax text is done by finding a new meaning from the same text written in the Law. Through this way of reading, then the meaning of tax will become a text with meanings that reflect 'certain justice' as stated by Bagir Manan (2009).

## **Research Method**

This study employs normative juridical research method using primary legal materials, especially tax laws that have been published as well as draft laws and tax facilities to strengthen the economy (Marzuki, 2010, p. 141). In addition, secondary legal material in the form of legal publications in the form of textbooks, legal journals and court decisions related to tax collection issues and other information in the form of articles published in the mass media. Moreover, the study uses statutory approach, concept approach and case approach and philosophical approach to address justice and legal certainty in the tax omnibus law.

## **Analysis and Discussion**

### *Omnibus Law Concept in Tax Collection*

The debate over the applicability of the tax omnibus law is inseparable from the objectives of providing investment certainty and protection and regulating the objectives of justice in the process of tax collection. The tax omnibus is essentially aimed at two meanings, certainty and fairness, which then

<sup>1</sup> The word 'force' arises first in Law No. 28 of 2007 as the Third Amendment of Law Number 6 of 1983 concerning General Provisions and Tax Procedures (UUKUP).

become flexible tax texts for the success of tax collection. The word 'omnibus' is often combined with 'bill' to "omnibus bill", as "a bill that deals with all proposals relating to a particular subject, such as an omnibus judgeship bill' covering all proposals for new judgeships..." (Omnibus Bill, 2004). The word "bill" itself means draft law. Hence, the concept of omnibus law (also known as the omnibus bill) is a concept for drafting a law that is often used in countries that adopt a common law system such as the United States in making a new law to amend several laws at once.

According to Asshiddiqie (2019), although Indonesia adheres to the tradition of the civil law system, this kind of practice is certainly not uncommon in the civil law tradition but henceforth is considered good and can continue to be practiced with the term Omnibus Law. The concept of omnibus is a formation arrangement of a comprehensive law by also regulating the material of other laws which are interrelated with the substance regulated by the law being amended or formed. With the omnibus format, the formation of a law is carried out by considering all material provisions that are directly or indirectly interrelated that are regulated in various other laws at once.

Asshiddiqie (2019) gave an example, the formation of a law which is commonly applied in Indonesia so far, even though it has been amended or revised four times, the mention of the title of the Law is very long. For example, "Law Number X concerning the Fourth Amendment to Law on State Administrative Court as amended by Law Number Y, and amended again by Law No. Z, and finally amended by Law Number ABC concerning State Administrative Court "Asshiddiqie (2019). Even though the said law still has problems overlapping with other laws.

The legal facts are evident from the amendments to the Law on General Provisions and Tax Procedures Number 6 of 1983 which was amended four times the last time with Law Number 16 of 2009 (UUKUP),<sup>2</sup> which then became the spotlight because it overlaps with other laws. Therefore, it was decided to draw up a "Draft Tax Provisions and Facilities for Economy Strengthening" (popularly called the tax omnibus law) which had an impact on six other laws even though the six affected laws<sup>3</sup> remained in effect as long as they did not conflict with the tax omnibus law.

Based on author's analysis, the Foreign Investment Law Number 25 of 2007 (UUPMA) should be an affected part related to the tax omnibus law because it is explicitly stated in the section considering letter b of the tax omnibus law bill that "in order to achieve a better economy as one of the goals of national development, efforts are needed to improve investment and a high competitive business climate, and provide equitable protection and regulation" (Republik Indonesia, 2020). The meaning of investment can be said to be the same as the meaning of "capital" which is regulated in the Foreign Investment (PMA) Law which is defined as "assets in the form of money or other forms that are not money owned by investors who have economic value" (Republik Indonesia, 2007).

More specifically, in carrying out investments, foreign parties who do so must be clarified by the form of business entities that run them, namely the legal entity Limited Incorporation (PT), whose capital investment is carried out in 3 ways: (1) taking a share of shares at the time of the company's establishment, (2) buying shares, and (3) other means according to the law (Republik Indonesia, 2007). In fact, PMA Law allow transfer of assets to parties desired by investors in accordance with statutory provisions (Republik Indonesia, 2007).

<sup>2</sup> The first amendment to Law No. 9 of 1994, the second amendment to Law No. 16 of 2000, the third amendment to Law No. 28 of 2007, and the fourth amendment to Law No. 16 of 2009.

<sup>3</sup> Six Laws Affected: (i) Law Number 6 of 1983 which has been amended by Law Number 16 of 2009 concerning General Provisions and Tax Procedures (UUKUP), (ii) Law Number 7 of 1983 amended by Law Number 36 of 2008 concerning Income Tax (PPh), (iii) Law Number 8 of 1983 amended by Law Number 42 of 2009 concerning Value Added Tax on Goods and Services and Sales Tax on Luxury Goods (VAT and PPnBM), (iv) Law Number 10 of 1995 which amended by Act Number 17 of 2006 concerning Customs, (v) Act Number 11 of 1995 amended by Act Number 39 of 2007 concerning Excise, and (vi) Act Number 28 of 2009 concerning Regional Taxes and Regional Levies.

According to (Republic Indonesia, 2007), this provision does not reduce the government's authority and rights for four things, these are:

1. Authority of the Government to enact statutory provisions that require implementation reporting of fund transfers;
2. Right of the Government to obtain taxes and/or royalties and/or other Government revenues from investments in accordance with statutory provisions;
3. Implementation of laws that protect the rights of creditors;
4. Implementation of laws to avoid state losses.

The regulation from several Articles of the PMA Law will inevitably be affected by the enactment of the tax omnibus law.

The application of the concept through tax omnibus has been carried out with the issuance of Law Number 9 of 2017 concerning Access to Financial Information for Taxation Purposes.<sup>4</sup> The norm of Article 8 states that there are five affected laws, which are Law Number 6 of 1983 concerning General Provisions and Tax Procedures, Law Number 7 of 1992 concerning Banking, Law Number 8 of 1995 concerning Capital Markets, Law Number 32 of 1997 concerning Commodity Futures Trading, and Law Number 21 of 2008 concerning Islamic Banking. The impact caused in relation to the confidentiality system of the five Laws above is not valid as long as it relates to the implementation of access to financial information for tax purposes.

The legal facts above show that tax omnibuses have been practiced. Compilation with omnibus concept due to the lack of synchronization of norms can be seen in Banking Law Number 10 of 1998 specifically concerning Bank Secrets. The politics of drafting the law norm have not fully supported the interests of the country's rights in collecting taxes. It may be that the political interests of the capital owners have not shown the transparency of their wealth whether or not taxes have been paid. Several parties do not wish banking access to be opened because if it is opened, it is prone to be misused so it needs to be kept a secret.

At least there are six (6) advantages in the concept of the omnibus law, these are: (1) to overcome conflicts of laws and regulations both vertically and horizontally; (2) to uniform government policies both at the central and regional levels to support the investment climate; (3) to cut licensing management more integrated, efficient and effective; (4) to cut the convoluted bureaucratic chains; (5) to increase coordination between relevant agencies; and (6) to provide legal certainty and legal protection for policy makers (Omnibus Law: Legal Solutions and Breakthroughs, n.a.). The omnibus concept becomes a way to improve the quality of regulations so as to create a pro-investment climate and ease of permission to do business.

Radbruch (as cited in Hujibers, 1982, p. 163) explains, "legal certainty is interpreted by the conditions under which law can function as regulations must be obeyed." The law in charge of creating legal certainty aims at creating order in society. The definition of certainty above can be interpreted that there is clarity and firmness of the application of law in society and does not cause misinterpretation. That is why the omnibus can be a guide for investors in investing.

In the current understanding, Rahardjo (1988, p. 533) explains that legal certainty is the state of the existence of a method. In practical demands, it is the existence of legal regulations. The existence of legal regulations is a demand to fulfill legal certainty (Rahardjo, 1988, p. 533). The legal norms set in the

<sup>4</sup> UU ini telah diajukan judicial review ke Mahkamah Konstitusi (MK) dan telah diputus dengan Putusan Nomor 102/PUU-XV/2017 Perihal Pengujian UU No. 9 tahun 2017 tentang Penetapan Peraturan Pemerintah Pengganti UU Nomor 1 tahun 2017 tentang Akses Informasi Keuangan Untuk Kepentingan Perpajakan Menjadi Undang-Undang.

tax omnibus are the methods for fulfilling legal certainty. On a practical level, capital owners want legal certainty through the issuance of laws to protect their legal interests.

The consideration of legal certainty is a mere fulfillment of practical needs, even though the capital owner may not think further about the content of the published regulations. In terms of ethics, such legal certainty is considered by Rahardjo (1988, p. 533) as a certainty which contains values on the principle that a "regulation must exist before an act is carried out."

### *Tax Justice in Omnibus Law*

Justice in taxation is always accompanied by two opinions. First, tax collection does not serve to justice. Tax collection goes hand in hand with power. Even leveling tax collection with power is reflected in the norms of the laws that govern it. If that happens, the existing power is not a power for devotion. Djajadiningrat (1965, p. 21) states that power generated without devotion is wildness.

Therefore, the concept of the tax omnibus is aimed at the goal of justice so that taxpayers who have not met their tax obligations can be fulfilled on the basis of the Act. Djajadiningrat stated:

Tax collection is a power that is so large that is in the hands of the state, even" the law" can be created by the state itself. Therefore, it must be accompanied by devotion to the people, to the general welfare, so that it is transformed into justice. (Djajadiningrat, 1965, p. 22)

It was stated by Djajadiningrat in relation to justice in taxation that:

Tax law deals with such complex aspects and must pay attention to the societal symptoms and face interests that sometimes conflict with each other, existed in a much more difficult situation than other parts of law, but even so, tax law as well as other parts of jurisprudence, continue to serve justice. (Djajadiningrat, 1965, p. 22)

Prins (1951) lawyer also said, in a book titled *Het Belastingrecht van Indonesie*, that "...belastingrecht in de ware zin, hetwelk streeft naar oplegging van lasten volgens regelen, die er toe strekken het rechtgevoel te bevredigen." In English it reads "... tax law in the real sense seeks to impose taxes whose purpose is to fulfill a sense of justice" (See Mahkamah Konstitusi, 2010). In other words, tax law must be based on justice and not on mere authority.

The history of fair tax collection has been recalled by King Solomon or Solomon in Israel by stating that the government should collect taxes fairly to uphold the country (See Book of Proverbs, 29:4). The meaning is easy to understand when two people are in the same condition or ability but pay different taxes. Likewise, if three Directors of a company have the same ability but differ in taxes paid, or pay less than ordinary employees of the same company.

Therefore, the philosophical concept of the omnibus law is in line with Jhering's teachings which assert that law or law is a fusion of interests. The law is a shared order of life that is considered in accordance with national interests, as well as pursue of benefits (Tanya, Simanjuntak, & Hage, 2010, p. 108). The drafting of the law is also intended for the general welfare of the community (*bonum commune communitatis*). The concept of the tax omnibus has emphasized the existence of objectives of justice and certainty, including the aim of encouraging national-scale priority sectors and promoting financial market development.

Even though the tax issue is not a major factor in increasing funding in investment in Indonesia (Badan Koordinasi Penanaman Modal [BKPM], 2017),<sup>5</sup> the tax omnibus law requires that the goal of increasing investment to be a top priority and ultimately, the legal certainty desired by business actors in investing in Indonesia. This condition was strengthened by the fact that none of the 33 Chinese companies are investing in Indonesia but rather investment is done in other countries such as Malaysia, Thailand and Cambodia (Hamdani, 2019). This situation shows that the legal certainty of business in Indonesia must be improved.

Fair certainty in law, including tax omnibus law related to investment is characteristic of the law. Because without a certainty value, it will lose its meaning and can no longer be used as a guideline, such as the expression of sweet potato juice incertum, mother juice nullum, where there is no legal certainty, there is no law (Darmodiharjo & Shidarta, 1996, p. 44). It can be concluded that legal certainty is identical to the law itself, as explained by Rahardjo (1988) as the existence of rule of law.

Certainty with pressure on speed becomes important for investors. Wirawan B. Ilyas states:

...the ease and variety of other regulatory issues really require a breakthrough to change the concept of thinking. Tactical thinking by compiling norms - including composing tax norms in the concept of the omnibus law - must be immediately pursued. (Ilyas, 2019, 6)

Ilyas (2019) refers to the concept of law as described by Eugen Ehrlich, which is interpreted economically as awareness of needs (*opino necessitatis*). This awareness causes the emergence of law as a living law. Speed of time provides convenience (tax facilities as well as licensing) and certainty, become the main key needed by investors (Ilyas, 2019).

### *Sanction Norms in Tax Omnibus Law*

One of the regulations considered important in the tax omnibus law is the regulation of administrative sanctions that specializes regulation for interest and administrative sanctions in the form of fines. No longer regulated sanctions increases as regulated in the KUP Law. Norms on interest administration sanctions and fines do not explain the difference. The emphasis on interest sanctions is aimed at the condition of tax must be paid but not or paid less than the amount of monthly interest rate determined by the Minister of Finance (Republic of Indonesia,).

Whereas the fine sanctions are aimed at administrative errors such as not making tax invoices, not filling tax invoices completely, and not reporting activities as Taxable Business/Company. The amount of penalty sanctions consists of a percentage amount of 1 percent, 100 percent, 200 percent and a maximum of 400 percent. Excise tax is levied twice, at most five times.

The amount of interest of sanctions and fines do not reflect the degree of sanctions. Unclear distinction between interest sanctions and fines result in the amount of money to be paid. It is necessary to emphasize the need for understanding what is meant by sanctions of interest and what is meant by sanctions of fines which needs to be included in the rules.

The missing regulation on criminal sanctions in the tax omnibus law, according to the author, stems from the fact that criminal sanction is not required as part of the law material, moreover the material in the tax omnibus is aimed at regulating tax objects that must be met according to the exact rate and tax material as a stimulus for prospective investor to put their investment in Indonesia.

<sup>5</sup> Tax indicators are in seventh position out of the ten indicators assessed. The first indicator is investment licensing.

Manan (Discussion, September 20, 2014) stated that administrative law does not have to regulate criminal sanctions, in fact there are no sanctions allowed because they are only regulating. Manan (2014) added that:

If a law does not regulate criminal sanctions, the law does not consider it necessary and criminal sanctions cannot be imposed. It could also be that the criminal refers to general crime and if that happens it must meet the elements of general crime.... (Manan, Discussion, September 20, 2014)

The author concludes that tax omnibus is an administrative norm, so the sanctions are administrative.

### **Conclusion**

The implementation of the omnibus concept to the tax omnibus law is not a new concept in the legal system in Indonesia because it has already been implemented in the practice of drafting laws. Such practice provides convenience and goodness in the context of carrying out tax collection on the basis of the law even though it is not normally practiced in countries adopting a civil law system. The success of tax collection cannot be separated from the success of increasing investment in a country. Therefore, tax omnibus law is needed in order to obtain an increase in tax revenue with the ultimate goal of using tax for the purpose of justice and public welfare.

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